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**Labor Law—Railway Labor Act—Use of Union Funds for Non-bargainable Purposes**

The right to work or to be employed is property within the meaning of due process and is entitled to legal protection.[1] One cannot be deprived of the right to work by an arbitrary mandate of the legislature;[2] however, the right is subject to reasonable regulation under statutes enacted in the exercise of the police power.[3] Many states,[4] including North Carolina,[5] have enacted statutes[6] or constitutional provisions[7] providing that no one shall be denied an opportunity to attain or retain employment because he is or is not a member of a labor organization. These laws outlaw both union and closed shop agreements.[8] However, it has been held that these state laws must yield to federal laws permitting such union security provisions in a field over which the federal government has jurisdiction.[9]

One such federal law is the Railway Labor Act. This act was amended in 1951 to authorize a labor organization to make agreements with carriers requiring membership in the organization as a condition of employment.[10] Membership under such an agreement

[1] Truax v. Raich, 239 U.S. 33 (1915).

[2] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[3] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[4] Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah and Virginia. The "Right to Work" law in Louisiana is limited to agricultural and certain processing workers. See Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959).

[5] See N.C. GEN. STAT. §§ 95-78 to -84 (1958).

[6] See, *e.g.*, GA. CODE ANN. §§ 54-901 to -09 (1961).

[7] See, *e.g.*, FLA. CONST., *Declaration of Rights* § 12.

[8] For the effect of these laws on the agency shop, see Johanneson, *Recent Decisions Concerning the Agency Shop*, 40 N.C.L. REV. 603 (1962).

[9] Hudson v. Atlantic C.L.R.R., 242 N.C. 650, 89 S.E.2d 441, *cert. denied*, 351 U.S. 949 (1956).

[10] 64 Stat. 1238, 45 U.S.C. § 152, which provides in part: "any carrier or carriers as defined in this Chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class. *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any other than the failure of the employee to tender the

cannot, however, be denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments.[11]

The constitutionality of security agreements entered into pursuant to the union shop amendment was attacked in *Hanson v. Union Pac. R.R.*[12] In this case the plaintiffs sought to restrain the carrier and the unions from putting into effect union shop agreements containing provisions expressly authorized by the union shop amendment. The Supreme Court of Nebraska held that the enforcement of these contract provisions would deprive the plaintiffs of the freedom to join or not to join in association with others as guaranteed by the first amendment, and would deprive them of property without due process of law, as guaranteed by the fifth amendment, by requiring them to pay for many things besides the cost of collective bargaining. The defendants appealed to the United States Supreme Court, which reversed.[13] In upholding the constitutionality of the union shop amendment, the Court stated that it was enacted pursuant to the power of Congress under the commerce clause,[14] and superceded any state law to the contrary by its express terms and, therefore, by force of the supremacy clause of the federal constitution.[15]

In *Allen v. Southern Ry.*[16] the North Carolina Supreme Court was presented with a similar constitutional question. In this case non-union employees of the railroad sought an injunction to restrain collection from them of dues, fees, or assessments not reasonably necessary and related to collective bargaining. The trial court enjoined the collections but provided that if the union would present proof as to what portion would be reasonably necessary to collective bargaining, such portion could be collected. The defendants appealed to the North Carolina Supreme Court which, in reversing, stated: "the very questions now raised by plaintiffs were before the Court and decided in *Hanson* . . . ."[17] The court interpreted *Hanson* as holding that a requirement that plaintiffs pay ordinary periodic dues

periodic dues, initiation fees and penalties, uniformly required as a condition of acquiring or retaining membership."

[11] *Ibid.*

[12] 160 Neb. 669, 71 N.W.2d 526 (1955).

[13] Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956).

[14] U.S. CONST. art. I, § 8.

[15] U.S. CONST. art. 6, § 2.

[16] 249 N.C. 491, 107 S.E.2d 125 (1959).

[17] *Id.* at 504, 107 S.E.2d at 133.

and initiation fees uniformly required of all members violates neither the first nor the fifth amendments.

Plaintiffs, however, contended that the questions raised in *Allen* were not decided by *Hanson* but were, in fact, expressly reserved. In support of their contention, plaintiffs cite language of Justice Douglas, who, in writing for the majority of the Court in *Hanson,* stated: "If assessments are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."[18] The North Carolina Supreme Court, however, was of the opinion that the questions reserved in *Hanson* would arise only if and when defendant-unions should undertake to deny membership or to terminate membership because of the failure of plaintiffs to comply with the various regulations applicable to voluntary members, *e.g.* refusal to sign application blanks or failure to attend meetings.[19]

After the adverse decision of the North Carolina court, the plaintiffs filed a petition for rehearing. The petition was allowed, but the court deferred rehearing pending the decision of the United States Supreme Court on a case on appeal from the state of Georgia. In this case, *International Ass'n of Machinists v. Street,*[20] the plaintiffs sought to enjoin the enforcement of a union shop agreement entered into pursuant to the Railway Labor Act. Plaintiffs alleged that the agreement required as a condition of continued employment that the employees pay union dues which would be used to support political and economic programs, and candidates for office opposed by the plaintiffs. The trial court granted the relief sought, and this was affirmed on appeal by the Georgia Supreme Court which held that the union shop agreement violated the plaintiffs' right to freedom of speech and deprived them of their property without due process of law. The defendants appealed to the United States Supreme Court which reversed the holding as to the constitutional issues.[21] While recognizing that the case squarely presented "the

[18] *Id.* at 503, 107 S.E.2d at 133, citing from 351 U.S. at 238 (1956).

[19] In a dissenting opinion, Justice Parker felt that the case presented the very question reserved in *Hanson,* and that it was not within the concept of due process to compel a person to contribute dues and fees from his earnings for the purpose of promoting political and ideological ends to which he is opposed, and of electing men to public office whose purposes he may distrust, and if he does not so contribute to discharge him from his job with loss of seniority.

[20] 215 Ga. 27, 108 S.E.2d 796 (1959).

[21] International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

constitutional questions reserved in *Hanson*"[22] as to the use of exacted funds for political purposes opposed by the employees, the Court avoided deciding these questions by construing the Railway Labor Act to deny such use of the funds.[23] The case was remanded to the Georgia Supreme Court for consideration of a proper remedy.[24]

After the decision of the Supreme Court in *Street,* a rehearing was held in the *Allen* case. This time,[25] the court was equally divided.[26] Thus, the trial court was affirmed without becoming precedent.[27] As a result, the union must prove what portion of the

[23] *Id.* at 749.

[24] In Lathrop v. Donohue, 367 U.S. 820 (1961), a companion case with *Street,* a Wisconsin lawyer brought an action to recover dues paid to the integrated state bar. He alleged that the bar "has used its . . . funds in active opposition to the adoption of legislation which" he favored. *Id.* at 822. Although the case arose on a demurrer, a plurality of the Court again refused to consider the constitutional issues because plaintiff did not indicate "whether any of his dues were used to support the State Bar's positions." *Id.* at 846. See note 30 *infra.*

[25] The United States Supreme Court stated that appropriate remedies in such a case do not include an injunction against the enforcement of a union shop agreement, or an injunction barring the union from collecting any funds from its objecting members, nor an injunction against all expenditures for the disputed purposes, even if the injunction is conditioned on cessation of the improper expenditures. The Court suggested, however, that appropriate remedies would include (1) an injunction against expenditures, for political causes opposed by the complaining employee, of a sum which is so much of the money exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget, or (2) restitution to an individual employee of that portion of his money which the union expended for the political causes to which he had advised the union he was opposed. In the latter remedy, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

[26] Allen v. Southern Ry., 256 N.C. 700, 124 S.E.2d 871 (1962).

[27] Justice Sharp declined to take part in the consideration of the rehearing because she had presided at the hearing of the case and had entered an interlocutory order at the superior court level.

[28] The court cited two North Carolina cases, Schoenith v. Town & Country Realty Co., 244 N.C. 601, 94 S.E.2d 592 (1956) and Ward v. Odell Mfg. Co., 126 N.C. 946, 36 S.E. 194 (1900), to support the proposition that the trial court should be affirmed. However, neither of these cases involved a rehearing. Actually, it would seem that the law in North Carolina is contrary to the result of this decision. See Best & Co. v. Maxwell, 311 U.S. 454 (1940) where the United States Supreme Court in commenting on the history of the case stated: "The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand." 311 U.S. at 455. The case was reversed by the Supreme Court on other grounds.

The few cases which have decided the point elsewhere are in conflict. See Pitton v. Atlantic C.L.R.R., 144 Fla. 462, 198 So. 503 (1940), holding that an equal division of the court on rehearing works an affirmance of the previous

exacted funds would be reasonably necessary to collective bargaining. Otherwise, it would be enjoined from making any further collections from union members.

A view somewhat analogous to that taken by the North Carolina trial court was taken by the Supreme Court of Georgia[28] when considering the *Street* case on remand from the United States Supreme Court. Here the Court directed the trial court to determine the amount being expended for non-bargainable purposes, and to enter a decree accordingly. If the trial court was unable to make this determination, it was directed to enjoin the union from spending any money for political purposes.

The view taken by the North Carolina trial court would seem to be a desirable one since it would be impractical, if not impossible, for a union member to prove what portion of his dues and assessments were being expended for non-bargainable purposes. Under this view the union members would be required only to prove that *some* of the union funds were being used for non-bargainable purposes. The court would then enjoin further collections and expenditures until the union could prove *how much* was being used for bargainable purposes.

In conclusion, it may only be said that this area of the law remains in a state of confusion. The *Street* case, while authority for the proposition that the Railway Labor Act prohibits compulsory contributions by union members to non-bargainable political purposes, leaves the constitutional issues unanswered. *Lathrop v. Donohue,*[29] a companion case with *Street,* merely adds further confusion to the law. Although a majority of the members of the Court agreed in *Lathrop* that the constitutional issues were properly raised,[30] the

opinion of the appellate court and not an affirmance of the judgment appealed from, when the original judgment was reversed and Richards v. Burden, 59 Iowa 723, 13 N.W. 90 (1882), holding that the lower court would be affirmed in such a case.

This point of the *Allen* case will be commented on in the *Tenth Annual Survey of North Carolina Case Law,* which will appear in a later issue of the *Law Review.*

[28] International Ass'n of Machinists v. Street, 217 Ga. 351, 122 S.E.2d 220 (1961).

[29] 367 U.S. 820 (1961).

[30] Five members of the Court agreed that a constitutional question was raised. Of these five, two felt that a state can, without violating the constitution, compel a lawyer to pay dues to be used in part for support of legislation which he opposes. Another member felt that a state may require "that a lawyer pay to its designee an annual fee . . . as a condition of its grant, or of

effect of the decision is, perhaps, best summed up by Justice Black, who, in a dissent, states: "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."[31] The problem is further complicated in North Carolina due to the fact that the court on rehearing the *Allen* case did not refer to the constitutional issues in its opinion. In any event, the court was equally divided and, therefore, the holding of the case, whatever it may be, is not precedent for future litigation.

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**Torts—Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability**

In *Holytz v. City of Milwaukee*[1] an action was brought by a three-and-one-half year old infant against the defendant municipality for injuries sustained when a steel trap door, covering a water meter pit, fell on her hands. An action was also brought by the infant's father to recover for medical expenses incurred by him as a result of his child's injuries, and for damages due to loss of her society and companionship. The injuries occurred while the infant was using a playground maintained by the defendant for pre-school aged children. It was alleged that the employees of the defendant had negligently allowed the trap door to remain open.

The Wisconsin Supreme Court, reversing the trial court which had sustained the defendant's demurrer, held that the municipality was not immune from liability for its negligent torts. In so holding, Wisconsin joined at least four other states[2] which have abolished by

continuing its grant, to him of the *special privilege* . . . of practicing law in the State." *Id.* at 865. Two members agreed that the powers conferred on the bar violated both the first and fourteenth amendments. Finally, a plurality of four members refused to consider the constitutional issues. *Cf.*, United States v. CIO, 335 U.S. 106 (1948) and United States v. International Union UAW, 352 U.S. 567 (1957) construing 18 U.S.C. § 610 which prohibits any corporation or labor organization from making "a contribution or expenditure in connection with any election to any political office . . . ."

[31] 367 U.S. at 865.

[1] 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[2] *California,* see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (Sup. Ct. 1961); *Florida,* see Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); *Illinois,* see Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Michigan,* see Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).